No. 18,898

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN PHILLIP HAMILTON, JR.,

Appellant,

vs.

SECRETARY OF DEFENSE and COMMANDING OFFICER, Armed Forces Examining and Induction Station, 1033 South Broadway, Los Angeles, California,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Jurisdiction.

This appeal is from a judgment of the District Court of the United States, Southern District of California, Central Division, denying a Petition for a Writ of Habeas Corpus.

The district court had jurisdiction by virtue of 28 U. S. C. § 2241.

This court has jurisdiction to review, on appeal, the final orders of the district court by virtue of 28 U. S. C. §§ 1291, 1294(1) and 2253.

Statement of the Case.

Appellant, petitioner below, filed a Petition for a Writ of Habeas Corpus alleging that he was illegally inducted into the United States Armed Forces. Pursuant

to the petition, the court below issued an order directed to the respondents (appellees) to show cause why a writ of habeas corpus should not issue. The Order to Show Cause also restrained the Commanding Officer of the Armed Forces Examining and Induction Station, Los Angeles, California, from removing the petitioner from the Central Division of the United States District Court, Southern District of California, pending the hearing and determination of the Petition for a Writ of Habeas Corpus. On August 28, 1963, the Petition for a Writ of Habeas Corpus was dismissed and the Order to Show Cause was discharged.[1]

Facts.

The facts pertinent to this appeal are as follows:

On February 6, 1963, the petitioner's local draft board mailed the petitioner a Notice of Classification (SSS Form No. 110) informing him that he had been classified in draft classification 1-A [certified copy of petitioner's Selective Service File, page 14, attached as Ex. "A" to respondents' Return to Order to Show Cause and Answer to Petition for a Writ of Habeas Corpus].[2] On February 25, 1963, the petitioner was ordered to report for induction into the Armed Forces of the United States. [Ex. "A" p. 89.]

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[1]On August 26, 1963, the court below allowed the petitioner bail pending appeal and also restrained the respondents from removing the petitioner from the jurisdiction of the court. On September 16, 1963, this court revoked the petitioner's bail and on September 24, 1963, vacated the district court's restraining order.

[2]Hereinafter referred to as Exhibit "A".

On February 27, 1963, the petitioner wrote his local draft board requesting postponement of induction and a special hearing. [Ex. "A" p. 90.][3]

On February 28, 1963, the petitioner, in another letter to his draft board, conceded that his request for a personal appearance was submitted after the period allowed for such a request had passed, but requested the board to favorably consider granting him a special hearing. [Ex. "A" p. 92.]

On February 28, 1963, the local board informed petitioner that a special hearing could not be granted but that any additional information he wished to submit for consideration would be evaluated by the board at their meeting on March 6, 1963. [Ex. "A" p. 91.] [By way of background, the following facts are material: On October 18, 1961, the petitioner informed his local board that his dependency status had changed and that he was the sole support of his mother who was suffering from Parkinson's disease. [Ex. "A" p. 34.] On March 25, 1962, the petitioner submitted a Dependency Questionnaire to his local board which stated that he was contributing $75 a month for his mother's support. [Ex. "A" p. 41.] On April 25, 1962, the local board informed the petitioner that the facts presented in the Dependency Questionnaire did not warrant reopening or reclassification. [Ex. "A" p. 47.] On January 11, 1963, Paul K. Robertson, an attorney, wrote a letter to the "Selective Service Bureau, Local Draft Board,

[3]The respondents admit that this letter can be considered to be a request for a personal appearance.

1206 Main Street, Los Angeles, California" informing them that the petitioner had been appointed conservator or guardian of his mother's estate. [Ex. "A" p. 70.] This letter was forwarded to Local Board 30, 1322 Nevin Avenue, Richmond, California, the petitioner's local board, and was received by them on January 17, 1963. [Ex. "A" p. 81.] On January 19, 1963, the petitioner submitted another Dependency Questionnaire to his local board. [Ex. "A" pp. 83-86.] On February 25, 1963, the petitioner was ordered to report for induction into the Armed Forces of the United States.]

After receiving the board's letter informing him that he could submit additional information for their consideration [Ex. "A" p. 91], the petitioner wrote the board that there were certain documents, such as the court papers appointing him conservator and doctors' letters, that were not in the file. [Ex. "A" p. 97.] On March 6, 1963, the local board informed the petitioner that the order to report for induction was postponed so that he would be able to exercise his right of appeal. The board also requested that he submit documents showing his appointment as conservator or guardian of his mother's estate, the value of the estate, and a physician's statement of his mother's physical condition. [Ex. "A" p. 100.] On May 4, 1963, the petitioner's local board informed him that a review of his file did not warrant a reopening of his classification and that the file would be forwarded to the Appeal Board. [Ex. "A" p. 135.] On May 16, 1963, the Appeal Board, by a vote of 3 to 0, classified the petitioner 1-A. [Ex. "A" p. 137.] Appellant was then inducted into the United States Army on July 29, 1963.

Issues Presented.

Was the Appellant Illegally Inducted Into the United States Army?

I. Was the Appellant Entitled to a Personal Appearance Before His Local Board?

II. Was the Local Board Required to Reopen the Appellant's Classification and/or Did Its Actions Constitute Such a Reopening?

III. Can This Court Inquire Into the Decision of the Local Board That the Evidence Submitted by the Appellant Did Not Warrant a Reopening of His Classification? (Did the Board Act Arbitrarily, Capriciously and Without Basis in Fact in Denying the Request to Reopen)?

IV. Are the Respondents the Proper Parties to This Action?

ARGUMENT.

I.

Was the Appellant Entitled to a Personal Appearance Before His Local Board?

The regulations concerning a draft registrant's right to a personal appearance are in 32 C. F. R. The pertinent portion of the regulation involved is as follows:

> "§ 1624.1 *Opportunity to appear in person.*
>
> (a) Every registrant, after his classification is determined by the local board . . . shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. *Such 10-day period may not be extended.*" (Emphasis added.)

The Notice of Classification sent to the appellant (SSS Form 110) also makes mention of the time limitation regarding the right of a personal appearance before the local board and/or appeal.

In his Opening Brief, the appellant argues that the personal appearance is of the greatest importance when a registrant believes that his draft classification is erroneous. This may be true, but the registrant must still comply with the procedural requirements. The request must be made *within* ten (10) days of the mailing of the Notice of Classification, except in certain instances not material here. As the regulation involved (C. F. R. 1624.1(a)) prohibits an extension of the 10-day period within which to request a personal hearing,

the appellant's local board was without authority to grant the appellant's tardy request for the personal appearance. Since the appellant did not comply with the procedural requirements he cannot now complain that he was denied due process. [See, *United States v. Monroe,* 105 F. Supp. 785 (S.D. Calif. 1957), *Feuer v. United States,* 208 F. 2d 719 (9th Cir. 1953), *United States v. Bonga,* 201 F. Supp. 908 (E. D. Mich. 1962).]

II.

Was the Appellant's Local Board Required to Reopen the Appellant's Classification and/or Did Its Actions Constitute Such a Reopening?

The regulations concerning the reopening of a registrant's draft classification are found in 32 C. F. R. 1625. The pertinent portions are as follows:

"§ 1625.1 *Classification not permanent.*

(a) No classification is permanent. . . ."

"§ 1625.2 *When registrant's classification may be reopened and considered anew.*

The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, . . ., if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; . . . provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an *Order to Report for Induction (SSS Form No. 252)* or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the

> local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."[4] (Emphasis added.)

Appellant's citation of the above regulation is incomplete in that it omits that portion of the regulation emphasized by appellees. (See pp. 19, 20, of App. Op. Br.)

Appellees contend that the fact that the regulation states a classification may not be reopened after an Order to Report for Induction is mailed to the registrant is controlling in the instant case, and as the appellant was mailed an Order to Report for Induction on February 25, 1963 [Ex. "A" pp. 14 and 89] three days prior to the appellant's request for a personal appearance, the local board could not reopen the classification.

In *Feuer v. United States, supra* (9th Cir. 1953). this court held that under regulations dealing with reopening and renewed consideration of a registrant's classification a local board was not obligated to reopen a classification upon the registrant's request after the board had mailed him an Order to Report for Induction. (Where a registrant does not take advantage of his administrative remedies, he cannot complain that he was denied due process.) [See, *United States v. Mohammed,* 288 F. 2d 236, cert. den. 82 Sup. Ct. 37, 368 U. S. 820, 7 L. Ed. 2d 26, reh. den. 82 Sup. Ct. 238, 368 U. S. 922, 7 L. Ed. 2d 137, *United States v. Bartelt,* 200 F. 2d 385 (7th Cir. 1952).] Also, the requirement that a classification could be reopened after an Order to Report for Induction is mailed only

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[4]Section 1625.3(b) allows for reopening after a notice of induction if the registrant is entitled to a I-S deferment.

if there is a change in the registrant's status resulting from circumstances over which he had no control is not met in that the appellant's claim for a dependency classification was in effect prior to the time that the Order to Report for Induction was mailed. *Boyd v. United States,* 269 F. 2d 607 (9th Cir. 1959) and *United States v. Bonga, supra.*

Next, we come to the question of whether or not the board's action constituted a reopening. (Appellees assume that the appellant refers to the board's action in requesting additional information, considering this information, postponing the Order to Report for Induction, and transmitting the file to the Appeals Board.) In support of this contention the appellant cites the following Second Circuit cases: *Packer v. United States,* 200 F. 2d 540 and *Vincelli v. United States,* 215 F. 2d 210, rehearing 216 F. 2d 681. In *Packer, supra,* the Circuit Court found that the actions of a local board in cancelling an order of induction and allowing an appeal of the classification to the Appeal Board was considered a reopening of the case. Applying the *Packer* decision to the case at bar, the appellant contends that he, therefore, would be entitled to a reclassification and the attendant rights of a personal appearance, and, that by denying him that right would be a violation of due process.

The *Packer* case was reversed on what appears to be other grounds in *United States v. Nugent,* 346 U. S. 1, 73 Sup. Ct. 991, 97 L. Ed. 1417. This decision in *Nugent* had an effect on the Second Circuit's original decision in *United States v. Vincelli, supra.* In the rehearing of the *Vincelli* case, the court stated the effect of the Supreme Court's decision in *Nugent* on the Cir-

cuit's decision in *Packer*. This is found in 216 F. 2d 681, 682 and reads as follows:

"

> Judge Chase believes that the reversal of United States v. Packer, 2 Cir., 200 F.2d 540 by the Supreme Court in United States v. Nugent, 346 U.S. 1, 73 S. Ct. 991, 97 L.Ed. 1417, left untouched our holding that in the Packer case what the local board did amounted to a reopening. . . .
>
> Judges Frank and Hincks, however, are of the opinion that the mandate of the Supreme Court in the Packer case, the terms of which did not appear in the opinion of the Court as reported in 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417, was correctly construed by the trial court in the Packer case on remand as carrying a reversal of our holding that Packer's original classification had been reopened, since they feel that, were this not so, the Supreme Court would have held that Packer was denied procedural due process when the local board, by not sending him a new Form 110 notice, deprived him of an opportunity to request a personal appearance before it.
>
> But even so, we all agree that what the Supreme Court did in the Packer case does not preclude us from holding that Vincelli's 1-A classification was reopened. At most it destroys our Packer decision as a valid authority for that holding. For in Packer, the action of the local board, which we held to constitute a reopening, occurred while an order of induction was outstanding. And Regulation Sec. 1625.2 provided that 'the classification of a registrant should not be reopened after the local

> board has mailed to such registrant an Order to Report for Induction, . . . unless the local board first specifically finds that has (sic) been a change in the registrant's status resulting from circumstances over which he has no control.' There had been no such finding in the Packer case and if the Supreme Court held that there had been no reopening in that case, for aught that appears the ruling may have turned upon the fact that Packer had already been ordered to report for induction. . . ."

The above *Packer* and *Vincelli* decisions, cited by appellant in support of his claim that there was a reopening by the local board, supports the claim of the appellees that the actions of the local board in transmitting the appellant's file to the appeals board does not constitute a reopening of his classification.

III.

Can This Court Inquire Into the Decision of the Local Board That the Evidence Submitted by the Appellant Did Not Warrant a Reopening of His Classification? (Did the Board Act Arbitrarily, Capriciously and Without Basis in Fact in Denying the Request to Reopen)?

Although the appellees have shown that the local board could not, under existing regulations, reopen the appellant's classification, assuming that the court finds that the local board could have reopened the draft classification, the question now involved is, was the decision of the board a valid exercise of discretion or was its decision not to reopen arbitrary, capricious and without basis in fact.

The appellant cites *Dickenson v. United States,* 346 U. S. 389 (1953) and others for the proposition that upon the evidence presented by the appellant, the local board was required to reopen the appellant's draft classification, and their refusal to do so was arbitrary, capricious and without basis in fact. The appellees contend that the line of cases starting with *Dickenson* is limited to situations where a ministerial or conscientious objector deferment is involved, and these cases are not applicable to a dependency or hardship deferment.

Conceding the truth of the appellant's allegations concerning his conservatorship of his mother's estate and his mother's physical and mental condition, this is not sufficient reason upon which to defer the appellant on grounds of extreme hardship. In *Dickenson* and the cases following, the registrant is either entitled to a conscientious objector or ministerial deferment or he is not so entitled. [There are a line of cases holding that as an exemption from military service is an act of legislative grace, it may be abandoned by a selective service registrant's acts like any other personal privilege and to avail himself of the exemption, the registrant must comply with the regulations. *United States v. Schoebel,* 201 F. 2d 31 (7th Cir. 1953), *Keene v. United States,* 266 F. 2d 378 (10th Cir. 1959), *Boyd v. United States, supra, United States v. Bonga, supra.* (These cases deal with conscientious objector claims made after a Order to Report for Induction has been mailed the registrant).] In the appellant's situation the board decided that the evidence the appellant produced did not warrant a deferment on a hardship basis.

The regulation setting forth the requirements for such a deferment for reasons of *extreme* hardship require that the dependant be dependent upon the registrant for support, or in the case of a physically or mentally handicapped person the registrant assumes such support in good faith. 32 C. F. R. § 1622.30(b). The documents submitted by the appellant [Ex. "A" pp. 116-121] show that he was conservator of his mother's estate, and that the estate was valued at $17,444.77. In the Dependency Questionnaire submitted by the appellant [Ex. "A" pp. 83-86] the appellant did not show what amount of money he contributed to his mothers' support, he only stated that the monthly amount he contributed varied. He also stated that "I am now just beginning to bring in some income from the estate". The questionnaire also stated that his mother had remarried.

In the case of *Micheli v. Paullin,* 45 F. Supp. 687 (D.C. N.J. 1942), which concerned a dependency deferment, the court stated:

> ". . . The board had ample evidence before it to support its decision that the parents of the petitioner could sustain themselves in some manner for the duration of the war and to alter that decision would be purely a substitution of the court's judgment for that of the executive agencies under the Act and would make the court instead of the executive agencies the deciding mechanism as to who should serve in the Army, a function reserved alone for the Selective Service agency.
> . . . ." (P. 691.)

To show an abuse of discretion, the appellant must clearly demonstrate such an abuse, and, if there is any

rational basis upon which the Board's conclusion can be justified, it cannot be said to have acted arbitrarily or capriciously. *United States v. Stalter,* 151 F. 2d 633 (7th Cir. 1945).

Based upon the facts available to the local board, it cannot be said that the board's refusal to reopen was arbitrary, capricious and without basis in fact.

As the board exercised its discretion in determining not to reopen the classification, this court cannot inquire into the reasons for the board's decision. The leading case in the area of judicial review of a local board's actions is *Estep v. United States,* 327 U. S. 114, 66 Sup. Ct. 423, 90 L. Ed. 567. In that case the court stated:

> ". . . The provisions making the decisions of local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weight the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave to the registrant.
> . . . ." (P. 122.)

See also *United States v. Mohammed, supra, Dickenson v. United States, supra, Witmer v. United States,* 348 U. S. 375, 75 Sup. Ct. 392, 99 L. Ed. 428 (1955), *United States v. Diercks,* 223 F. 2d 12 (7th Cir. 1955), *United States v. Monroe,* 150 F. Supp. 785 (S.D. Cal. 1957).

Concerning the appellant's argument based on Executive Order 11119, this order is not material to this appeal as it took effect after the appellant's induction into the United States Army.

IV.

Are the Respondents the Proper Parties to This Action?

In the order dated September 16, 1963, this court requested briefs "on what jurisdiction the district court had or this court now has over the Secretary of Defense, whether he is a proper party, and whether the Commanding Officer of the Induction Station now is or ever was a proper party defendant".

As the Commanding Officer of the Induction Station was the person who had actual physical custody of the petitioner at the time the petition was served and was capable of producing the petitioner in court, he was the proper party to be named as respondent. *Commanding Officer, United States Army Base, Camp Breckinridge, Kentucky v. United States, ex rel Bumanis,* 207 F. 2d 499 (6th Cir. 1953), *Jones v. Biddle,* 131 F. 2d 853, cert. den. 63 Sup. Ct. 856, 318 U. S. 784, 87 L. Ed. 1152, rehearing den. 63 Sup. Ct. 1027, 319 U. S. 780, 87 L. Ed. 1725, and 63 Sup. Ct. 1431, 319 U S. 785, 87 L. Ed. 1728, *DeMaris v. United States,* 187 F. Supp. 273 (D.C. S.D. Ind. 1960).

Concerning the naming of the Secretary of Defense as a respondent, it appears that neither the district court nor this court has jurisdiction over the Secretary. This is by analogy to the *DeMaris* case, *supra,* where the court found that even though a prisoner had been committed to the custody of the Attorney General for

confinement, he is not a proper party to be served where a writ of habeas corpus is involved. His connection with federal penitentiaries is only supervisory and the proper person to name as respondent is the warden of the prison where the inmate is confined.

It would, therefore, appear that this action should be dismissed as against the Secretary of Defense.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that this court has no jurisdiction over the Secretary of Defense and, that the decision of the district court denying the appellant's Petition for a Writ of Habeas Corpus be affirmed.

Respectfully submitted,

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Certificate.

I certify, that, in connection with the preparation of this brief, I have read Rules 18 and 19, Rules of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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